



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: WAC 99 183 52046 Office: CALIFORNIA SERVICE CENTER

Date: FEB 27 2003

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation engaged in the import and wholesale of diamonds. It seeks to employ the beneficiary as its general manager. Accordingly, it seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary had worked in a primarily managerial or executive capacity for the United States company.

On appeal, counsel for the petitioner asserts that the Service did not state the facts that demonstrated its conclusion.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers.
-- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The issue in this proceeding is whether the petitioner has established that the beneficiary has been and will be employed in a primarily managerial or executive capacity for the United States

entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially described the beneficiary's duties as follows:

Directs and coordinates activities of the organization to obtain optimum efficient and economy of operations and maximize profits. Will be responsible for overseeing, expanding and regulating all of the company's activities. Directs and coordinates promotion of products manufactured or services performed to develop new markets, increase share of market, and obtain competitive position in industry. Will be responsible for the overall administration of the organization.

The director requested additional information to establish that the beneficiary had been and would be performing managerial or executive duties for the petitioner. The director specifically requested the petitioner's organizational chart and a description of the job duties of the employees under the beneficiary's supervision.

In response, the petitioner provided its organizational chart depicting a president, a sales manager, and the beneficiary's position of general manager. Both the beneficiary and the sales manager were shown to report to the president. The organizational chart depicted two employees under the beneficiary's supervision. The job titles of the two employees were shown as office administrator and controller. The petitioner also provided the following job descriptions for the two employees under the beneficiary's supervision.

[The office manager] is responsible for maintaining and organizing sales records. The Office Administrator also administers and records management policies intended to standardize filing, protecting and retrieving budget expenditures and attendance records as directed by the Office Manager. The Office Administrator is a salaried employee (\$72,000.00 Annually).

[The controller] has a Bachelor's Degree in Commerce. The Controller is responsible for analyzing financial information to prepare entries in accounts documenting business transactions. The Controller analyzes financial information detailing assets, liabilities, and capital. The Controller is a salaried employee (\$54,000.00 Annually).

The director determined that the record reflected that the beneficiary would be acting as a first-line supervisor of non-professional employees. The director concluded that the petitioner had not demonstrated that the beneficiary would be

employed in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary's job duties involve the management of an essential function of the foreign organization and that the beneficiary is acting in a managerial capacity. Counsel asserts that the petitioner requires sophisticated professional employees. Counsel also asserts that the beneficiary is engaged in an executive capacity. Counsel asserts the beneficiary's title demonstrates that the beneficiary will supervise the petitioner's day-to-day business affairs and concludes that this establishes that the beneficiary will direct the management of a major component of the petitioner. Counsel also asserts that the beneficiary establishes the goals and policies of the petitioner and has wide latitude in discretionary decision-making.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). In the initial petition, the petitioner provided a broad description that vaguely refers, in part, to duties such as "[d]irect[ing] and coordinate[ing] activities of the organization," and "overseeing, expanding and regulating all the company's activities," and "direct[ing] and coordinate[ing] promotion of products manufactured or services performed to develop new markets," and "responsible for the overall administration of the organization." The Service is unable to determine from these vague statements whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities. In addition, these statements are general in nature and do not convey an understanding of what the beneficiary will be doing on a daily basis.

Counsel asserts that the beneficiary is acting in a managerial capacity because he manages an essential function of the foreign entity and because the petitioner requires professional employees. However, the assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, the petitioner has not provided a description of the essential function the beneficiary purportedly manages and has not provided evidence that the employees the beneficiary supervises are professional employees. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). The description of the job duties for the two employees the beneficiary supervises does not convey a sense of what these employees actually do and does not support a conclusion that these two employees are professional employees. Furthermore, the description of the administrator's position states that the administrator reports to the office manager not the general

manager, the beneficiary's position. Whether the description contains a typographical error or is a statement of the actual corporate structure, the inconsistency creates confusion and must be explained. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

Counsel's reliance on the beneficiary's title of "general manager" is misplaced. The Service does not infer from a beneficiary's title that the beneficiary is serving the petitioner in a managerial or executive capacity. As noted above, the job description of the beneficiary's duties is key in determining whether the beneficiary is acting in a managerial or executive capacity. In this case, the indefinite nature of the beneficiary's job description does not support a conclusion that the beneficiary is directing a major component of the petitioner. Further, counsel's paraphrasing of portions of the elements of the definition of "executive capacity" does not enlighten the Service regarding the beneficiary's daily activities.

Counsel's assertion that the Service does not state the facts that allow its conclusion is not persuasive. Based on the lack of information contained in the record regarding the beneficiary's actual duties, the Service cannot conclude that the petitioner has met its burden of establishing that the beneficiary is acting in a managerial or executive capacity.

Upon review, the petitioner has not provided sufficient evidence to conclude that the beneficiary will be employed in a primarily managerial or executive capacity. The descriptions of the beneficiary's job duties are vague and fail to describe his actual day-to-day duties. In addition, counsel borrows liberally from the statutory definitions of managerial and executive capacity and then concludes that the beneficiary is acting in a managerial and executive capacity. The description of the duties to be performed by the beneficiary does not sufficiently demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision, or component of the company. Further, the record does not adequately demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.

